

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PHILLIP BARNETT</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 202,917
<b>ATCHISON CASTING CORPORATION</b>	)	& 202,918
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant appeals the December 14, 1999, Award of Administrative Law Judge Bryce D. Benedict. Claimant was denied benefits in Docket No. 202,917, having failed to submit a timely written claim. Claimant was further denied benefits in Docket No. 202,918, having failed to prove accident arising out of and in the course of employment, timely notice and timely written claim. In addition, the Administrative Law Judge found that claimant had suffered an intervening injury in December 1994 at his home which was the cause of his ongoing disability. Oral argument was held before the Appeals Board on May 3, 2000.

**APPEARANCES**

Claimant appeared by his attorney, Steven D. Treaster of Overland Park, Kansas. Respondent appeared by its attorney, John B. Rathmel of Overland Park, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purposes of this award.

**Docket No. 202,917****ISSUES**

The claimant's Application of Appeal in this matter listed several issues for consideration by the Appeals Board. However, at oral argument, claimant's and respondent's attorneys stipulated that the issues in this docket number were withdrawn and no longer before the Appeals Board for consideration. The Appeals Board, therefore, affirms the Administrative Law Judge's denial of benefits in this matter due to claimant's failure to submit timely written claim for the August 9, 1994, accidental injury.

**Docket No. 202,918****ISSUES**

- (1) Did claimant sustain personal injury by accident on October 27, 1994, arising out of and in the course of his employment with respondent?
- (2) Did claimant provide timely notice of his accident?
- (3) Did claimant serve timely written claim upon respondent?
- (4) What is claimant's average weekly wage for the October 27, 1994, accident?
- (5) Is claimant entitled to temporary total disability compensation for the October 27, 1994, accident?
- (6) What is the nature and extent of claimant's injury and/or disability?
- (7) Did claimant sustain an intervening accidental injury?
- (8) Is claimant entitled to unauthorized medical treatment for the October 27, 1994, accident?
- (9) Is claimant entitled to future medical treatment for the October 27, 1994, accident?

In addition, the respondent raised, in its submission letter to the Administrative Law Judge and to the Appeals Board, the issue of whether claimant was disabled for a period of at least one week from earning full wages at the work at which he was employed as a result of this accident. See K.S.A. 44-501; Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

K.A.R. 51-3-8 requires that, before the first full hearing, the parties shall confer as to what issues can be stipulated to and what issues are to be in dispute in the case. If the issues between the parties cannot be resolved, K.A.R. 51-3-8(b) requires that those issues be made a part of the record.

In this instance, K.S.A. 44-501, as interpreted by Boucher, *supra*, was not raised at the pretrial conference or at the regular hearing. Respondent first raised Boucher in its submission letter dated November 15, 1999.

This particular Administrative Law Judge requires a claimant's evidence be presented and all depositions taken by the time of the regular hearing which, in this case, began on August 26, 1999, and concluded on September 15, 1999. Respondent's first submission date or terminal date was scheduled for September 27, 1999. Two extensions then resulted in respondent's terminal date being extended to November 15, 1999, and respondent's final submission letter was not filed until December 14, 1999. However, claimant's submission letter was presented on August 26, 1999, at the time of the original regular hearing, with no additional extensions. For respondent to add an issue on December 14, 1999, nearly three months after claimant's submission letter was presented, would violate the rules of due process, which must be considered even in workers' compensation litigation. It is also significant the Administrative Law Judge did not address this issue, nor was it even listed as an issue in the Award. The Appeals Board will, therefore, not consider respondent's Boucher argument, as it was not timely presented to the Administrative Law Judge. Further, consideration of this late-raised issue would deny claimant the opportunity to defend. Therefore, respondent's issue involving K.S.A. 44-501, as interpreted by Boucher, is dismissed.

The Appeals Board finds that the Award of the Administrative Law Judge with regard to the remaining issues sets forth findings of fact and conclusions in some detail. The Appeals Board agrees with the analysis of the Administrative Law Judge and concludes the Award of the Administrative Law Judge should be affirmed.

The Appeals Board finds that claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment on October 27, 1994, and failed to provide timely notice or serve written claim on respondent as required by K.S.A. 44-520 and K.S.A. 44-520a.

While claimant alleges a significant back injury on October 27, 1994, he failed to mention this incident to his chiropractor, Allyn Smith, D.C., on November 2, 16 or 23, 1994, while receiving treatment for his neck, mid back and low back. It is also significant that claimant received identical treatment for his neck, mid back and low back on October 19, 1994, eight days before the alleged injury.

Further, claimant failed to mention this alleged October 1994 accident and injury to his general physician, A. K. Tayiem, M.D. Dr. Tayiem had been claimant's physician since 1987. Why did claimant, when being treated by Dr. Tayiem on November 29, 1994, fail to mention the October 27, 1994, incident?

The Appeals Board, further, finds it significant that claimant's chiropractic visits with Dr. Smith escalated dramatically after a December 1994 injury suffered while claimant was picking up sticks and twigs in his yard after an ice storm. It was also after this December incident that claimant stopped working for respondent.

Claimant does present some testimony supporting his allegations through the deposition of coworker Steven Dugger. However, while Mr. Dugger does remember claimant having an incident with a partition, Mr. Dugger was unable to say on what date this occurred and was not even able to verify with any accuracy the year in which it occurred.

Respondent's representatives, including Terry Robinson, the lead supervisor, Allan Hundley, the health and safety supervisor, James K. Bergstresser, a supervisor with respondent during claimant's employment, and Jim Williams, the employee relations supervisor for respondent, denied knowledge of the October 27, 1994, incident. In addition, Mr. Hundley denied ever receiving a written claim from claimant and was not advised by claimant that he was making a workers' compensation claim for the October incident.

Claimant submitted forms for weekly disability payments which would be paid only if the injury in question was not work-related. Claimant submitted documents when applying for this disability, indicating that he was unable to work and that it was not a work-related situation. As a result of those documents, claimant was paid a full 26 weeks of short-term disability.

In reviewing the evidence, the Appeals Board finds that claimant has failed to prove that he suffered an accidental injury arising out of and in the course of his employment on October 27, 1994, and further that he failed to prove that he submitted timely written claim or timely notice to respondent of this alleged accident. Therefore, the Award of the Administrative Law Judge denying claimant benefits for the October 27, 1994, accident should be affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated December 14, 1999, denying claimant benefits for the alleged accidents of August 9, 1994, and October 27, 1994, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven D. Treaster, Overland Park, KS  
John B. Rathmel, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director